A

GRESPA SDN BHD

v.

PEMUNGUT HASIL TANAH, NEGERI KEDAH DARULNAIM & ANOR

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
SULAIMAN DAUD JCA
C [CIVIL APPEAL NO: K-01-61-2000]
10 FEBRUARY 2009

LAND LAW: *Acquisition of land - Compensation - Claim for right and interest therein - Land Acquisition Act 1960, ss. 2, 36(2), Second*
D *Schedule (Forms E, G, H)*

This was the appellant's appeal against the decision of the High Court in respect of a land reference under s. 36(2) of the Land Acquisition Act 1960 ('the Act'). The learned judge had ordered
E the award of compensation in the sum of RM 2,685,000 ('the compensation') to be paid to Bank Kerjasama Rakyat Berhad ('the bank'). The appellant was one of many parties claiming an interest in the compensation. At the time of the publication of the gazette notification, the land in question was registered in the name of
F Asean Fertilizer Sdn Bhd ('Asean Chemical'). It was charged to the bank which entered a lien holder's caveat over the land. Subsequently, the land was transferred to and registered in the name of Rakyat Corporation. Both Asean Chemical and Rakyat Corporation were subsidiaries of the bank. Form E of the Act was
G issued on 6 June 1995 notifying all persons having interests in the land to appear before the Land Administrator ('LA') at a specified time and place to state the nature of their respective interests in the land. In the said inquiry, the LA awarded the compensation to the appellant as the person interested therein. The award of
H compensation was disputed by Rakyat Corporation which also claimed the right and interest therein. When the LA deferred payment of the compensation, the appellant made an application for an order for *mandamus* to order the LA to pay the same. Rakyat Corporation responded by applying for an order for
I *certiorari* to quash the said award made in Form G of the Act. Both parties then withdrew their respective applications when the LA made the said reference to the High Court. They also gave

notice of their intention to use the affidavits filed pursuant thereto in the said reference. The High Court decided that the compensation should be paid to the bank. Hence, the appellant's appeal premised on the supposition that it was the tenant or otherwise occupier of the land at the time of the gazette notification. As such, it was entitled to the compensation, the reason being, that there was a tenancy agreement in force at the material date between Rynex Corporation as the tenant and Asean Chemical as the landlord and registered owner of the land and that the appellant and Rynex were related companies as they were subsidiaries of the same holding company.

Held (dismissing the appeal)
Per Sulaiman Daud JCA delivering the judgment of the court:

(1) The evidence clearly showed that the tenancy agreement was entered between Asean Chemical and Rynex Corporation for the period beginning from 1 October 1992 and expiring on 30 September 1995. Under the tenancy agreement the tenant was not to sublet, assign or part with the legal or actual possession of the demised premises or any part thereof without the prior consent in writing of the landlord. The bank as the holding company of Asean Chemical in its letter dated 7 June 1994 rejected the application by Asia America Industries Sdn Bhd to have the said tenancy extended to a new joint venture company to be formed between the latter and Rynex Corporation upon the expiry thereof. It was clearly stated in the letter that the bank decided not to enter into any tenancy agreement with any other party other than Rynex Corporation. As such, it was not probable that Asean Chemical or the bank could have given its consent for Rynex Corporation to sublet the land to the appellant or to let the appellant into occupation thereof. In any event, there was no evidence adduced by the appellant to show such subletting or occupation. (paras 16 & 17)

(2) The facts and circumstances surrounding the acquisition of the land and the fact that both the appellant and Rynex Corporation were related companies were not sufficient proof of the appellant's occupation of the land at the material time. (para 18)

(3) Under the Act, Form E was a mere notification to all persons interested to appear at the inquiry. Likewise the issuance of Form G and the offer of compensation in Form H to the appellant were not sufficient proof of its right and interest in the land as the LA was empowered, under s. 36(2) of the Act, at any time on his own motion to refer to the court for determination as to the person entitled to such right or interest. In the present case, the issuance of both Form G and Form H were challenged and disputed by Rakyat Corporation which culminated in the said reference. (para 18)

(4) The fact that the appellant and Rynex Corporation were related companies did not confer on the former any right or interest to the tenancy agreement unless it could be shown that it had sublet the land to the latter or allowed it to occupy the same. The independent corporate personality of two subsidiaries were well settled. (para 19)

(5) There was no merit in the argument that it could be inferred from all the surrounding circumstances that the appellant was the tenant. At the most, the appellant was a tenant at will. However, the definition of 'person interested" in s. 2 of the Act from which the appellant sought support expressly excluded tenant at will. (para 20)

(6) The learned judge did not err in fact and in law in finding that the appellant failed to prove, on the balance of probabilities, the substratum of its claim. Also, the appeal only concerned the appellant's right and interest in the award of compensation. As such, the further question posed by the appellant as to whether the learned judge had correctly made the order for the compensation to be paid to the bank need not be answered. (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi berkaitan satu kes rujukan tanah di bawah s. 36(2) Akta Pengambilan Tanah 1960 ('Akta'). Yang arif hakim telah memerintahkan award pampasan sebanyak RM2,685,000 kepada Bank Kerjasama Rakyat Berhad ('bank'), dan perayu adalah salah satu pihak yang mempunyai kepentingan terhadap pampasan tersebut. Semasa pemberitahuan gazet disiarkan, tanah tersebut terdaftar atas nama Asean Fertilizer Sdn Bhd ('Asean Chemical'). Ia digadaikan kepada

bank yang memasukkan kaveat pemegang lien terhadap tanah. Tanah kemudian dipindahmilik dan didaftar atas nama Rakyat Corporation. Kedua-dua Asean Chemical dan Rakyat Corporation adalah subsidiari bank. Borang E Akta telah dikeluarkan pada 6 Jun 1995 memberitahu semua orang yang berkepentingan di dalam tanah untuk hadir di hadapan Pentadbir Tanah ('LA') pada masa dan tempat tertentu bagi mengemukakan bentuk kepentingan mereka masing-masing. Pada penyiasatan tersebut, LA telah mengawardkan pampasan kepada perayu sebagai orang yang berkepentingan. Award pampasan bagaimanapun dipertikai oleh Rakyat Corporation yang turut menuntut hak dan kepentingan terhadap tanah. Apabila LA menunda pembayaran pampasan, perayu telah membuat permohonan memohon perintah *mandamus* bagi memerintahkan LA untuk membayar pampasan kepadanya. Rakyat Corporation bertindak balas dengan memohon perintah *certiorari* bagi mengenepikan award yang dibuat di bawah Borang G Akta tersebut. Kedua-dua pihak kemudian menarik balik permohonan mereka apabila LA memfailkan rujukan ke Mahkamah Tinggi, sekaligus memberi notis untuk menggunakan afidavit-afidavit yang difailkan di dalam rujukan tersebut. Mahkamah Tinggi memutuskan bahawa pampasan harus dibayar kepada bank. Ini membangkitkan rayuan perayu yang berhujah bahawa pampasan harus dibayar kepadanya, kerana ia adalah tenant atau penghuni tanah semasa pemberitahuan gazet. Menurut perayu, ia berhak kepada pembayaran kerana terdapat perjanjian tenansi yang berkuatkuasa pada waktu tersebut di antara Rynex Corporation selaku penyewa dan Asean Chemical selaku tuantanah/pemilik berdaftar tanah, di mana perayu dan Rynex adalah syarikat bertalian memandangkan kedua-duanya adalah subsidiari kepada syarikat pemegang yang sama.

Diputuskan (menolak rayuan)
Oleh Sulaiman Daud HMR menyampaikan penghakiman mahkamah:

(1) Keterangan jelas menunjukkan bahawa perjanjian tenansi dimasuki di antara Asean Chemical dan Rynex Corporation bagi tempoh 1 Oktober 1992 dan berakhir 30 September 1995. Di bawah perjanjian tenansi, penyewa tidak boleh menyewa semula, menyerahhak atau meninggalkan milikannya, sama ada milikan sebenar atau milikan undang-undang, terhadap premis tersebut atau terhadap sebahagiannya, tanpa terlebih dahulu mendapat kebenaran bertulis tuantanah.

Melalui surat bertarikh 7 Jun 1994, bank, selaku syarikat pemegang Asean Chemical, telah menolak permohonan Asia America Industries Sdn Bhd untuk melanjutkan tenansi berkenaan kepada syarikat usahasama baru yang akan dibentuk antara pihak terkemudian tersebut dengan Rynex Corporation selepas tenansi sedia ada luput. Dalam surat tersebut jelas dinyatakan bahawa bank memutuskan untuk tidak memeterai apa-apa tenansi dengan mana-mana pihak kecuali Rynex Corporation. Oleh itu, adalah tidak mungkin bahawa Asean Chemical atau bank boleh memberi kebenaran kepada Rynex Corporation untuk menyewa semula tanah kepada perayu ataupun membenarkan perayu menduduki tanah. Walau apapun, tiada keterangan dikemukakan perayu bagi menunjukkan penyewaan semula atau pendudukan sedemikian.

(2) Fakta dan halkeadaan yang menyelubungi pengambilan tanah dan fakta bahawa kedua-dua perayu dan Rynex Corporation adalah syarikat bertalian bukanlah bukti mencukupi yang menunjukkan penghunian tanah oleh perayu.

(3) Di bawah Akta, Borang E hanyalah satu pemberitahuan kepada semua orang yang berkepentingan untuk hadir di penyiasatan. Begitu juga, pengeluaran Borang G serta tawaran pampasan dalam Borang H kepada perayu bukan bukti mencukupi yang menunjukkan hak dan kepentingannya di dalam tanah kerana LA diberi kuasa, di bawah s. 36(2) Akta, pada bila-bila masa dan atas initiatifnya sendiri untuk merujuk kepada mahkamah bagi memutuskan siapakah yang berhak kepada hak dan kepentingan tersebut. Dalam kes semasa, pengeluaran kedua-dua Borang G dan H telah dicabar dan dipertikai oleh Rakyat Corporation yang akhirnya membawa kepada rujukan berkenaan.

(4) Fakta bahawa perayu dan Rynex Corporation adalah syarikat bertalian tidak memberikan kepada pihak terdahulu sebarang hak atau kepentingan kepada perjanjian tenansi kecuali ianya dapat ditunjukkan bahawa ia telah menyewa semula tanah kepada pihak terkemudian atau membenarkan pihak terkemudian tersebut menduduki tanah. Bahawa dua syarikat subsidiari mempunyai personaliti bebas dan berasingan adalah hakikat yang sudah lama diterima pakai.

(5) Tiada merit pada hujah bahawa ianya boleh diandaikan dari keseluruhan halkeadaan kes bahawa perayu adalah seorang penyewa. Paling tinggi pun, perayu hanyalah seorang penyewa at will. Apapun, definasi 'orang berkepentingan" di dalam s. 2 Akta yang menjadi pergantungan perayu secara ekspres menyisihkan penyewa at will.

(6) Yang arif hakim tidak khilaf di sisi fakta dan undang-undang dalam mendapati bahawa perayu gagal membuktikan, atas imbangan kebarangkalian, teras tuntutannya. Juga, rayuan hanya berkaitan hak dan kepentingan perayu terhadap award pampasan. Oleh itu, soalan selanjutnya yang dikemukakan perayu berhubung sama ada yang arif hakim betul dalam memerintahkan pampasan dibayar kepada bank tidaklah perlu dijawab.

Case(s) referred to:
Owners of the Cargo Laden on the Albacrus v. The Albazero [1977] AC 774 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 101
Land Acquisition Act 1960, ss. 2, 36(2), Second Sch, Forms E, G, H

For the appellant - K Nadarajah (Bosco Philip Anthony & AG Das with him); M/s Tan Bak Lee & Co
For the 1st respondent - Murtazadi Amran; Legal Advisor
For the 2nd respondent - Zamani Ibrahim (Mohd Hanif Idris with him); M/s Zamani Ibrahim Tarmizi & Co

[Appeal from High Court, Alor Star; Case No: 15-49-1998]

Reported by Usha Thiagarajah

JUDGMENT

Sulaiman Daud JCA:

[1] This is an appeal against the decision of the High Court at Alor Setar in respect of a land reference under s. 36(2) of the Land Acquisition Act 1960 ("the Act") whereby the learned judge ordered the award of compensation in the sum of RM2,685,000 ("the said compensation") to be paid to Bank Kerjasama Rakyat Berhad ("the bank"). The appellant is one of the persons claiming an interest in the said compensation.

[2] The said compensation was awarded in respect of three factory buildings, the costs for removal of machineries and rewiring, transfer cost, loss of earning, etc. pursuant to a compulsory acquisition of certain land on which the buildings were situated. After hearing submissions of counsel from both parties, we dismissed the appeal with no order as to costs. We now give our reasons for the decision.

[3] The reference relates to land known as Lot 936 H.S.(M), Mukim Kuala Kedah, Daerah Kota Star, Kedah ("the said land"). It was acquired for public purpose *vide* Kedah State Gazette dated 13 April 1995 ("Gazette notification").

[4] At the time of the publication of the Gazette notification the said land was registered in the name of Asean Chemical Fertilizer Sdn Bhd ("Asean Chemical"). It was charged to Bank Kerjasama Rakyat Malaysia Berhad ("the bank") which also entered a lien holder's caveat over the land. Subsequently, on 28 February 1998 the said land was transferred to and registered in the name of Rakyat Corporation. Both Asean Chemical and Rakyat Corporation are subsidiaries of the bank.

[5] Form E of the Act ("Form E") was issued on 6 June 1995 notifying all persons having interests in the said land to appear before the Land Administrator at the specified time and place to state the nature of their respective interests in the land. The said inquiry was held at Kota Setar land office on 30 November 1996 where the Land Administrator awarded the said compensation to the appellant, Grespa Sdn Bhd ("Grespa") as the person interested therein.

[6] The said award of compensation was disputed by Rakyat Corporation which also claimed the right and interest therein. When the Land Administrator deferred its payment, the appellant, Grespa moved the court by way of an originating motion for *mandamus* to order the Land Administrator to pay the same. Rakyat Corporation responded by filing a separate originating motion for *certiorari* to quash the said award made in Form G of the Act ("Form G"). Both parties however withdrew their respective motions when the Land Administrator made the said reference to the court. They also gave notice of their intention to use the affidavits filed pursuant thereto in the said reference.

[7] The appellant is aggrieved by the decision of the court which made the order for the said compensation to be paid to the bank, and hence this appeal.

[8] The learned counsel for the appellant submitted that the relevant date for the determination of such right and interest is the date of publication of the Gazette notification, ie, 13 April 1995. He pointed out at that date there was a tenancy agreement in force between Rynex Corporation, as the tenant, and Asean Chemical, as the landlord and registered owner of the said land commencing from 1 October 1992 and expiring on 30 September 1995 ("the tenancy agreement").

[9] From the affidavit evidence and submission of the learned counsel, it is apparent to us that the substratum of the appellant's claim is premised on the supposition that Grespa was the tenant or otherwise the occupier of the said land and buildings together with the machineries therein at the time of the Gazette notification.

[10] The question is whether the appellant was such tenant or occupier at the said date, or the latest at the time of the inquiry. This is a question of fact. It is trite law that he who alleges must prove it. This is clearly provided by s. 101 of the Evidence Act 1950 which reads as follows:

> 101. (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that these facts exist.
>
> (2) When the person is bound to prove the existence of any fact, it is said that the burden of proof lies on him.

[11] In the present appeal it is the appellant who had asserted that it was the tenant or occupier of the said land and the buildings thereon at the material time, and therefore the onus is on the appellant to satisfy the court of such fact.

[12] Before us, the learned counsel for the appellant candidly agreed that there was no direct evidence to show that the appellant, Grespa was the tenant or occupier of the said land. Nevertheless it is submitted that such tenancy or occupancy can be inferred from the facts and circumstances surrounding the acquisition and the relationship between Rynex Corporation and Grespa.

[13] The circumstances surrounding appellant's claim appear from the various affidavits sworn by its director, Ng Long Seng, which can be summarized as follows:

(a) Grespa was the tenant of the said land and the buildings thereon at the date of the Gazette notification on 13 April 1995, which tenancy was further extended to a monthly tenancy beginning from 1 March 1996.

(b) Grespa was served with the said Form E giving notice of the intended acquisition, and that the deponent attended the inquiry before the Land Administrator on 30 November 1996 where he presented the appellant's claim on the said buildings and machineries.

(c) The award of compensation in Form G dated 30 November 1996 was made in the name of, and issued to, the appellant as the person interested thereto.

(d) Form H of the Act, also dated 30 November 1996 ("Form H") was served on the appellant notifying the award and offering compensation in the said sum which was accepted by the appellant.

[14] The deponent further asserted that Rynex Corporation was the former name of Grespa. However when the assertion was challenged by the production of the particulars of Rynex Corporation issued by the Registrar of Companies ("ROC"), which did not show any such change, the deponent changed his stand and averred that his earlier assertion was due to typographical error. It was then averred that the appellant Grespa and Rynex Corporation were related companies as subsidiaries of the same holding company IFQ Sdn. Bhd.

[15] The learned judge in his judgment found as a fact that the appellant was neither the tenant nor the occupier of the said land or the buildings thereon to have any right or interest in the said compensation. The learned judge in arriving at such a decision has considered the fact that the tenancy agreement was entered between Asean Chemical and Rynex Corporation. It is also his finding that the assertion that Grespa was formally known as Rynex Corporation was not supported by the aforesaid company search issued by the ROC.

[16] Having perused through the affidavit evidence, the grounds of judgment and the submission of the learned counsel, we were inclined to agree with his finding. The evidence clearly showed that the said tenancy agreement was entered between Asean Chemical and Rynex Corporation for the period beginning from 1 October 1992 and expiring on 30 September 1995. The application by Rynex Corporation to renew the said tenancy was rejected by the bank as the lien holder who instead granted to the latter a monthly tenancy effective from 1 March 1996.

[17] It is also noteworthy that under the tenancy agreement the tenant shall not sublet, assign, or part with the legal or actual possession of the demised premises or any part thereof without the prior consent in writing of the landlord. The affidavit evidence clearly showed that the bank, as the holding company of Asean Chemical, in its letter dated 7 June 1994 had rejected the application by Asia America Industries Sdn Bhd to have the said tenancy extended to a new joint venture company to be formed between the latter and Rynex Corporation upon the expiry thereof. It is clearly stated in the said letter that the bank had decided not to enter into any tenancy agreement with any other party other than Rynex Corporation. By reason thereof it is also not probable that Asean Chemical or the bank could have given its consent for Rynex Corporation to sublet the said land or buildings to Grespa or otherwise to let Grespa into occupation thereof. In any event there is no evidence adduced by the appellant to show such subletting or occupation.

[18] We are also of the view that the facts and circumstances surrounding the acquisition of the said land as disclosed by the appellant's supporting affidavit together with the fact that both Grespa and Rynex Corporation are related companies as the subsidiaries of the same holding company are not sufficient proof of the appellant's occupation of the said land and buildings at the material time. Under the Act, Form E is a mere notification to all persons interested to appear at the inquiry. Likewise the issuance of Form G and the offer of compensation in Form H to Grespa are not, in our view, sufficient proof of its right and interest in the said land and buildings as the Land Administrator is empowered under s. 36(2) of the Act, at any time of his own motion, to refer to the Court for its determination as to the person entitled to such right or interest. In the present case the issuance of both Form G and Form H were challenged and disputed by Rakyat Corporation which culminated in the said reference.

[19] In our considered view, the fact that Grespa and Rynex Corporation were related companies did not confer on the former any right or interest to the said tenancy agreement unless it can be shown that it has sublet the said land or buildings to the latter or allowed it to occupy the same. The independent corporate personality of two subsidiaries were well settled. In *Owners of the Cargo Laden on the Albacrus v. The Albazero* [1977] AC 774, at p. 807, Roskill LJ observed:

> ... each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the right of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or the body in whom those rights were vested in law ....

[20] The learned counsel for the appellant further argued that even if no formal tenancy agreement existed between Rynex Corporation and Grespa, it can still be inferred from all the surrounding circumstances that Grespa was the tenant in the loose sense. With respect, we find no merit in the argument. Having viewed all the evidence before us, we find nothing therein from which such fact may be inferred. At the most we can only find that Grespa was a tenant at will, if at all it existed. However the definition of "person interested" in s. 2 of the Act, from which Grespa sought support, has expressly excluded tenant at will.

[21] For all the reasons aforesaid, we are satisfied that the learned judge has not erred in fact and in law in finding that Grespa has failed to prove, on the balance of probability, the substratum of its claim.

[22] Finally we would add that since this appeal only concerns Grespa's right and interest in the said award of compensation, it is not incumbent on our part to answer the further question posed by the appellant as to whether the learned judge had correctly made the order for the said compensation to be paid to the bank.

[23] On the foregoing ground, we unanimously dismissed the appeal but with no order as to costs. The order of the High Court was affirmed, and the deposit to be refunded to the appellant.